No. 11750

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

AERONAUTICAL INDUSTRIAL DISTRICT LODGE *727*, an unincorporated association,

Appellant,

vs.

JAMES L. CAMPBELL, MITCHELL B. JOPLIN, MALCOLM E. KIRK and LOCKHEED AIRCRAFT CORPORATION, a corporation,

Appellees,

APPELLANT'S REPLY BRIEF.

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namely *Koury v. Elastic Stop Nut Corp.,* 162 F. (2d) 544; *DiMaggio v. Elastic Stop Nut Corp.,* 162 F. (2d) 546 and *Payne v. Wright Aeronautical Corp.,* 162 F. (2d) 549. As has been previously pointed out, these cases represent square authority for the questions of law presented by this appeal. The other line of authorities relied on by the respondents herein, are represented by the District Court decisions of these same cases. This Court on appeal is called upon either to adopt the law as was announced by the Circuit Court of Appeals in the foregoing cases, or to reject the law as so announced by that Circuit Court of Appeals.

While it must be conceded that one Circuit Court of Appeals is not bound to follow the law as is announced by the Circuit Court of another Circuit, nevertheless the opinion of a Circuit Court of Appeals represents the highest form of precedent and authority and should be highly persuasive, and in the interests of uniform administration of the law, this Court should give due weight and consideration to the opinion of another Circuit which has considered and passed upon the same legal questions.

The respondent appellees have, in their brief, urged among other grounds why this Court should reject the interpretation of the law as expressed by the justices of the Third Circuit Court of Appeals, that the Court consider the number of District and Circuit Court judges who took a different view from the opinions expressed by the majority opinion of the Third Circuit Court of Appeals. The appellant knows of no precedent for such a basis of attack upon the opinion of a Circuit Court judgment, and the appellant respectfully urges that the law as expressed by the Circuit Court of Appeals is nonetheless valid and is nonetheless strong authority

notwithstanding the fact that a number of different lower courts Judges have assumed a different interpretation of the law.

Likewise, the two expressions of the Supreme Court on the subject of veterans reemployment rights cannot be considered as anything but *obiter dicta* with reference to the matters before this Court in this case. The Supreme Court in the two cases it did decide (*Fishgold* case and *Trailmobile case*) did not have before it the issues of fact and law which were presented in the *Gauweiler* case nor in the present case. Sofar as the appellant has been able to ascertain, no appeal has been made to the Supreme Court from the *Gauweiler* case or its companion cases.

The petitioner appellees seek to distinguish the case on appeal from the *Gauweiler, Koury, DiMaggio* and *Payne* cases on the facts. The facts do not bear out their contention of a distinction on the facts. A statement of the facts of the *Gauweiler* case as given in the opinion of the Circuit Court by Chief Justice Goodrich negatives any basis for differentiation between that case and the present case. Justice Goodrich in that case summarized the facts and questions as follows:

> "A man is employed by a corporate employer. His employment is interrupted by his call for service in the armed forces. He qualifies and is inducted into the army. During his absence a new contract is negotiated by the employer and the union which is the authorized bargaining agent for the employees in the plant. Under the terms of the new agreement, the seniority provisions which existed earlier are modified so that certain union officials become entitled to higher seniority than anyone else. In the course of time our employee returns from his

tively. Upon their reemployment, a lay-off occurs. If the opinion of the District Court in this case is now followed through, Veteran A's place on the seniority list would be ahead of the union chairmen whose top seniority was created by the new contract, but Veteran B, inducted one day later, would find himself in a seniority position inferior to that of the union chairmen since the new contract, giving top seniority to union chairmen, was in effect the day that he was inducted, and his seniority rights are to be governed by the contract in effect at the time of his induction.

The stipulation urged so strongly by the petitioner appellees as grounds for distinguishing this case from the *Gauweiler* case [Rep. Tr. pp. 125-126], to the effect that Lockheed Aircraft Corporation first operated under one seniority policy and then operated under the other seniority policy, and that "the application of either policy has not proved inconvenient to the company" is very different from the situation hereinabove presented. It is one thing to uniformly treat all employees, veterans and non-veterans, alike under one contract or under the other contract. It is a highly different situation to operate under both contracts simultaneously, concurrently and with one set of veterans enjoying seniority rights under one contract and another set of veterans enjoying seniority rights under another contract. This is undoubtedly one of the very situations which the Court considered as impractical under the *Payne* and *DiMaggio* cases. Rather than distinguishing the case at bar from the impractical

situation referred to in the majority opinions in the *Payne* and *DiMaggio* cases, the case at bar emphasizes the utter impossibility and impracticability of allowing two sets of seniority rights to exist side by side as would be the case here. Lockheed Aircraft Corporation at no time was forced to, nor did it, grant some veterans seniority under the old contract, and at the same time grant other veterans seniority rights under the new contract, and it is doubtful that the respondent Lockheed Aircraft Corporation could effectively do so even if it tried. Yet this very result would follow if the District Court judgment were upheld in the case at bar. Some veterans would enjoy seniority rights under one contract while a fellow veteran would have his seniority based on a later contract. Such a result was not contemplated by the law.

Likewise, the second claimed basis of distinction between the case at bar and the *Gauweiler* case as indicated (b) above, namely that the contract of 1945 in the case at bar made specific reference to the Selective Training and Service Act, while the *Gauweiler* case and the companion cases are silent as to a similar provision in their contract, is likewise not a valid point of distinction. The 1945 agreement provided in Section 6 of Article IV that:

> "Employees (other than temporary employees) who shall have left the employment of the company for the purpose of entering the armed forces of the United States shall be reemployed with the company in accordance with the Selective Training and Service Act of 1940 as such Act may be amended."

Such contractual provision added nothing to the contract with reference to employees seniority rights. The company was bound to reemploy veterans in accordance with the Selective Training and Service Act of 1940 whether the contract provided for the reemployment or not. The contractual provision in question did not affect the seniority rights of any of the employees, and the provision in question did not change, add or detract from the rights of the parties hereto. The Selective Training and Service Act of 1940 was in effect at the time of the making of the Collective Bargaining Agents herein involved, and the provisions of the Act are as equally effective whether they were specifically referred to in the Agreement or not. Appellant has no quarrel with the statement of the law as enunciated by the appellees as follows:

> "Laws which subsist at the time and place of the making of a contract and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. . . . This principle embraces alike those which affect its validity, construction, discharge or enforcement."
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> *Farmers & M. Bank v. Fed. Res. Bank,* 262 U. S. 649, 660; 43 S. Ct. 651; 67 L. Ed. 1157, 1164.

It would appear therefor that the inclusion of Section 6, Article IV to the 1945 agreement added nothing to the rights of the parties hereto and is not a valid basis for claiming any factual distinction between the contractual provisions in the case at bar from the contractual provisions discussed in the *Gauweiler* case.

II.

The Provisions of the 1945 Collective Bargaining Agreement Do Not Discriminate Between Veterans and Non-Veterans, Nor Against Veterans as Such.

Notwithstanding the appellees' contention that the 1945 Collective Bargaining Agreement discriminated against veterans, no such discrimination exists in fact or in law. The appellee, Lockheed Aircraft Corporation asserts that the 1945 agreement is discriminatory against veterans because such employees would have had no opportunity to be appointed as Union chairmen, or vote for their group chairmen, while they were in the armed forces. Such an argument is without merit. At all times during their period in the armed services, the petitioner appellees were members of the appellant union and had all of the opportunities to vote for their group chairman had they so desired. This is equally true after they returned to the job after their military service. No facts were presented to the trial court and none were covered by any Stipulation with reference to whether or not the petitioner appellees could or could not have voted for their group chairmen or whether or not they had any opportunity to be appointed as a senior chairman, and it is not proper for this Court on appeal to speculate as to these matters. These matters are irrelevant and immaterial to the basic problem of law presented to the Court. The 1945 contract applied equally to all employees of Lockheed Aircraft Corporation. This was true whether they were veterans or non-veterans. The factual situation of discrimination referred to in the *Gauweiler* case is not present in fact in the case at bar.

Likewise, no discrimination within the meaning of the *Gauweiler* case exists by reason of creating top seniority by contract for certain union officials. It is not unusual in labor contracts to provide that certain employees shall head the seniority lists. One reason for this provision is the desirability of maintaining a union representative at work at all times to represent the interests of the members and to prevent an employer unfriendly to the union from discharging everyone on the seniority list up to and including the last union member employee. With reference to this type of contractual provision, Chief Justice Goodrich in the *Gauweiler* case declared as follows:

> "In entering into labor contracts, the bargainers must make their agreements with a view to the rights of the entire group bound by them and not enter into agreements which discriminate against one part for the benefit of another. The provision for top or preferred seniority for union officers and other officials is neither uncommon nor arbitrary. It may add a pleasant emolument to a particular union office, but it also provides what union members may well consider a highly essential need; that is, to have their own representatives on the job to look after their interests so long as work is being done in the plant."

The petitioner appellees as members of the appellant union, would undoubtedly agree that union security as is provided for by such a provision is beneficial both to the union and to themselves as members of the union.

The interpretation of the Selective Training and Service Act as announced in the decision of the trial court in effect gives to veterans a form of "super-seniority." The doctrine of "super-seniority" has been repudiated by the United States Supreme Court in the *Fishgold* case. The

criterion for testing the rights of a returning veteran is, we feel, an examination of the rights of the employee who stayed on the job at the war plant and rendered service to his country in that way. Thus, the veteran must not be required to lose any of the rights which he would have had had he stayed at home. The Supreme Court in the *Fishgold* case declared as follows:

> "We would distort the language of these provisions if we read it as granting the veteran an increase in seniority over what he would have had if he had never entered the armed services."

The same union was certified as the bargaining agent for the petitioner appellees before their induction as after their induction. The same union as their collective bargaining agent negotiated the first contract as well as negotiated the second contract. Had the petitioner appellees been inducted into the armed services one day after the new contract had become effective rather than a short time before, there would be no question but what they would be bound by the terms of the collective bargaining agreement. After June 4, 1945, the seniority rights of all of the employees who remained on the job, and all of the veterans who were inducted thereafter into the armed services, were determined by the terms of the new contract. The petitioner appellees were restored to their position and enjoyed during the period of their reemployment all of the benefits which the new contract conferred upon the employees. If the test is as we think the Supreme Court has declared it to be, and as we know the Third Circuit Court has declared it to be in the *Gauweiler* case, the petitioner appellees should be bound by the terms of the new contract just as they would have been had they been continuously on the job at home rather than in the

armed forces. They would have enjoyed all the rights of their stay-at-home brethren by applying the terms of the new contract. To give them more rights or higher seniority than the man who stayed at the plant is to give them a super-seniority. This theory of "super-seniority" the Supreme Court rejected in the *Fishgold* case.

III.

Selective Training and Service Act Provisions Gave Legal Recognition to the Seniority Systems in Effect in Private Industry but Did Not Enlarge Upon Nor Create Positions of Seniority Which Did Not Already Exist by Contract.

A reading of the Selective Training and Service Act reveals that the Act seeks to protect the veteran in preserving and restoring to him those seniority rights which he had by reason of an existing contract. The act did not give the veteran any seniority whatsoever (save the right to be reemployed) if he did not already have seniority rights by virtue of an existing contract or an existing statute. The Act did not give John Doe any seniority rights as we know seniority rights to be, if John Doe was so unfortunate as to be employed by an employer who had no contractual agreement to give his employee any seniority rights. Seniority rights as the term is here used, refers only to the right of an employee to have preferences over other employees by reason of longer service with the company.

In the case at bar, the petitioner appellees would have had no rights to seniority, had there been no contract

between the union and the employer which created those rights. Employment in and of itself gives no rights of seniority to an employee. *Elder v. N. Y. Central Railway,* 152 F. (2d) 361. Selective Training and Service Act, thus said in effect, in those places of employment where there is existing seniority privileges recognized by contract, the veteran is entitled to them. In other words, he is given protection in his contractual rights, by force of the law. But the Act does not say, nor can it seriously be contended that it says, that an employee in a plant without any contractual provisions for employee seniority rights has any job seniority rights, as the term is herein used, by reason of the act itself. If such were the case, just what seniority rights would the employee in a plant without a contract have? Such a result cannot seriously be claimed.

Conclusion.

The sole question for decision on the appeal is whether or not the seniority rights of a returning veteran are to be determined by the contract which was in effect on the day of the induction of the veteran, or do the seniority rights provided for in a subsequent contract in effect at the time of the reemployment and lay-off of the veteran control. Iit is respectfully submitted that a Court of the highest authority has determined as a matter of law that the seniority rights of the veteran are determined by applying the test—what would the veteran's seniority rights have been had he been "either continuously on the job in the plant or away on furlough or

leave of absence for some personal reason." Appellant respectfully urges that no adequate reason has been shown why the doctrine of the *Gauweiler* case should not be declared to be the applicable law of this case, nor have any facts been shown to distinguish or differentiate the case at bar from the *Gauweiler* case.

Appellant respectfully urges that the judgment of the District Court in the case at bar be reversed.

Respectfully submitted,

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